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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
G & G TRUCKING COMPANY, INC.,	**CASE NO. 97-42012-7**
	CHAPTER 7
DEBTOR.	
NEWCOURT FINANCIAL USA, INC.,	
PLAINTIFF,	
v.	**ADV. NO. 97-7119**
G & G TRUCKING COMPANY, INC., DOONAN TRUCK AND EQUIP. OF WICHITA, INC., STATE BANK OF DELPHOS, DAVID R. KLAASSEN, and, DARCY D. WILLIAMSON, Trustee,	
DEFENDANTS.	

MEMORANDUM OF DECISION

On January 28, 1999, this proceeding was before the Court for resolution of a number of issues concerning the chapter 7 trustee's claims that the bankruptcy estate's interests in a number of truck tractors and trailers are superior to the liens claimed by Newcourt Financial USA, Inc. ("Newcourt"), Associates Commercial Corporation ("Associates"), and State Bank of Delphos ("State Bank"). The Court announced its ruling on most of those issues at that time, but indicated it would have to further review matters to resolve the trustee's assertions that: (1) the estate is immune from the creditors' claims that the corporate debtor ratified certain pre-incorporation actions taken by its incorporator; and

(2) Newcourt failed to take steps required to reperfect its lien following a transfer of its collateral. The trustee appeared *pro se*. Newcourt appeared by counsel Anne L. Baker and Bruce J. Clark. Associates, whose dispute with the trustee actually arose from its motion for stay relief but has been incorporated into this proceeding by agreement of the parties, appeared by counsel David S. Fricke and Timothy H. Girard. State Bank appeared at the hearing by counsel Gary H. Hanson, who replaced former counsel William H. Zimmerman, Jr.

FACTS

The following pertinent facts are not disputed. For some period of time before December 1996, Marvin Gehrke and another person operated a business called G & G Hog Company, Inc. ("G & G Hog"), that bought and sold hogs, and hauled freight by truck. Newcourt had a valid lien on a truck tractor that G & G Hog owned and the lien was properly perfected by being noted on the vehicle's title. Gehrke and his associate decided to split up G & G Hog, with Gehrke receiving the trucking part of the business.

Gehrke planned to operate his trucking business in Salina, Kansas, and to incorporate it as G & G Trucking Company, Inc. ("G & G Trucking" or "debtor"). On December 6, 1996, he signed notes and security agreements in the name of G & G Trucking, borrowing money from or assuming existing debt to Associates and pledging various truck tractors and trailers as security. G & G Trucking's articles of incorporation were not filed with the Kansas Secretary of State's office until December 9, three days later. The next day, on behalf of G & G Trucking, Gehrke signed a note and security agreement in favor of State Bank. Then, on December 13, a copy of the debtor's articles of

incorporation were filed with the Saline County Register of Deeds. Gehrke was G & G Trucking's only incorporator, and at all times thereafter was its only officer and shareholder. G & G Trucking's official corporate records apparently contain no record of any formal ratification of Gehrke's pre-incorporation execution of the notes and security agreements with Associates and State Bank.

When G & G Hog transferred to G & G Trucking the truck tractor on which Newcourt had its lien, G & G Trucking agreed to assume the related note and obligations to Newcourt. Newcourt agreed to the transfer but did not release its lien. Although G & G Trucking did not apply for a new title as soon as it was supposed to, it did list Newcourt as a lienholder when it applied for the title, and the new certificate of title showed Newcourt as lienholder. The truck tractor was damaged in an accident in May 1997, but it was repaired and sold. G & G Trucking filed for bankruptcy on July 22, 1997. Less than a week later, the debtor received an insurance check covering the damage to the truck tractor and reimbursement for the business interruption or loss that occurred while the truck tractor was being repaired. The trustee now has both the sale and insurance proceeds.

DISCUSSION AND CONCLUSIONS

The trustee contends Associates' and State Bank's security agreements with the debtor were not valid because Gehrke signed them for the debtor before it existed. The trustee is correct in her view that Associates' security agreements pre-dated the corporation's existence, but is mistaken in her view that the same is true for State Bank's security agreements. The Court will explain this mistake first.

At least since 1987 and up until July 1, 1998, Kansas law provided that a corporation came into existence on the date when its articles of incorporation were filed in the Office of the Secretary of State, so long as a copy of the articles was ultimately recorded with the Register of Deeds in the county where the corporation's registered office in Kansas was or would be located. *Fee Ins. Agency, Inc. v. Snyder, 261 Kan 414, 417-21 (1997); K.S.A. 17-6003 (Furse 1995) & -6006*. Recording the articles with the Register of Deeds more than twenty days after filing them with the Secretary of State increased the fee that must be paid to the Register of Deeds, but no longer delayed the beginning of the corporation's existence, as it had before a statutory amendment in 1987. *261 Kan. at 421*.[1] Since Gehrke signed State Bank's documents for the debtor after the debtor's articles of incorporation were filed with the Secretary of State and a copy of the articles was later recorded with the appropriate Register of Deeds, through relation back, the debtor effectively came into existence before State Bank's documents were signed.

The trustee argues that because Associates' documents were signed *before* the debtor existed, the corporation had to affirmatively ratify Gehrke's actions *after* it came into existence. She suggests this could not have happened because neither Gehrke nor his counsel were aware that what she calls "the incorporation/security agreement problem" was a problem until she raised the issue. She also seems to suggest there could be some question of when or if the debtor ever became aware of Gehrke's pre-incorporation actions, apparently forgetting that the debtor was Gehrke's one-man show,

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[1]Effective July 1, 1998, the Kansas legislature amended K.S.A. 17-6003(c) and (d) so that recording with a register of deeds is no longer required, and articles of incorporation are effective as soon as they are properly filed with the Secretary of State. *K.S.A. 1998 Supp. 17-6003(c) & (d); 1998 Kan. Sess. L. ch. 39, §1*.

so to speak. That is, he was the only officer or shareholder it ever had. Of course, once he assumed his corporate roles, he still knew in those capacities what he had personally done on behalf of the debtor before it was effectively incorporated. The most basic flaw in the trustee's argument here, however, is her view that the debtor had to take affirmative steps to ratify Gehrke's slightly premature actions.

In remarks the trustee quoted in her brief, the Kansas Supreme Court explained that this is not the law:

> Ratification is the adoption or confirmation by a principal of an act performed on his behalf by an agent which act was performed without authority. The doctrine of ratification is based upon the assumption there has been no prior authority, and ratification by the principal of the agent's unauthorized act is equivalent to an original grant of authority. *Upon acquiring knowledge of his agent's unauthorized act, the principal should promptly repudiate the act; otherwise it will be presumed he has ratified and affirmed the act*. [Citations omitted.] Knowledge of the unauthorized act is essential for the principal to ratify the act, and must be shown or facts proved that its existence is a necessary inference therefrom.

Brown v. Wichita State Univ., 217 Kan. 279, 287 (1975) (emphasis added). As this explanation makes clear, as soon as the debtor-corporation came into existence and found out that Gehrke had already signed Associates' documents on its behalf, the debtor had to "promptly repudiate" Gehrke's acts or else become bound by them. Because it did not repudiate Gehrke's acts, the debtor is presumed to have ratified them once it learned of them. The court's explanation also makes clear that the knowledge the corporation had to obtain for its duty to repudiate to arise was knowledge of Gehrke's acts, not knowledge that his acts had to be ratified. As indicated, since Gehrke was the only corporate officer, only he needed to acquire this knowledge and of course when the corporation came into existence, he already knew what he had done. Under the circumstances, the debtor ratified the

agreements with Associates on the effective date of its incorporation by failing to repudiate Gehrke's acts promptly. *See also Wilson v. Harburney Oil Co., 89 F.2d 211, 213 (10th Cir. 1937) (applying Kansas law, debtor corporation liable on promoters' preincorporation contract).*

Section 544 of the Bankruptcy Code provides in pertinent part:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
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> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists; [and]
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> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists.

The trustee suggests ratification is an equitable defense similar to a constructive trust, a defense generally not available against a bankruptcy trustee under this provision. She insists that recognizing "an unrecorded undisclosed claim" of ratification would, like the imposition of a constructive trust, violate the policies that are served by §544(a). The Court cannot agree. In this case, so far as public documents and titles show, the debtor entered into the various agreements with Associates. Ratification applies merely to fill a small, insignificant gap that appears only when the date of the debtor's incorporation is compared to the date on which Gehrke signed Associates' documents. Ratification is presumed to have occurred unless the corporation never learned of Gehrke's preincorporation acts or acted promptly to repudiate those acts upon learning of them. A constructive trust, by contrast, is imposed as a remedy to contradict the apparent ownership of property as shown by public documents and titles. *See Restatement (First) of Restitution §160 (1937).* So, ratification confirms record title,

a constructive trust changes it. A lien or judgment creditor cannot defeat Associates' liens on the debtor's property by claiming there is no record of ratification since that is presumed to have occurred, but only by claiming that the debtor never learned of Gehrke's acts or that it repudiated his acts. The debtor's knowledge is conclusively established here because it was Gehrke's one-man corporation. The trustee has not alleged that Gehrke ever caused his corporation to repudiate his preincorporation acts after the corporation came into existence.

The trustee contends that Newcourt did not properly perfect its lien after G & G Hog transferred Newcourt's collateral, the truck tractor, to G & G Trucking, citing K.S.A. 1996 Supp. 8-135(c)(5) and K.S.A. 84-9-302 (Furse 1996).[2] She concedes Newcourt's lien was properly perfected so long as G & G Hog owned the vehicle. While K.S.A. 1996 Supp. 8-135(c)(5) describes how a secured creditor may first get its lien noted on the title to a vehicle, the Court believes subsection (c)(1) of that statute explains what happened with Newcourt's lien in this case. It reads in pertinent part:

> An application for certificate of title shall be made by the owner . . . upon a form furnished by the division and shall state all liens or encumbrances thereon, and such other information as the division may require. Notwithstanding any other provision of this section, no certificate of title, other than a duplicate title, shall be issued for a vehicle having any unreleased lien or encumbrance thereon, unless the transfer of such vehicle has been consented to in writing by the holder of the lien or encumbrance. . . . The certificate of title shall be in a form approved

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[2]K.S.A. 8-135 has been amended three times since G & G Hog transferred Newcourt's collateral to G & G Trucking. *See 1997 Kan. Sess. L. ch. 56, §1 (eff. July 1, 1997); 1997 Kan. Sess. L. ch. 138, §6 (eff. Jan. 1, 1998); 1998 Kan. Sess. L. ch. 140, §8 (eff. July 1, 1998)*. However, the version applicable at the time of the transfer is the one found in the 1996 Supplement to Kansas statutes. K.S.A. 84-9-302 has been amended once since the transfer. *See 1997 Kan. Sess. L. ch. 78, §1 (eff. July 1, 1997)*. The version applicable at the time of the transfer is found in the 1996 bound volume of chapter 84 of the Kansas statutes.

> by the division, and shall contain a statement of any liens or encumbrances which the application shows, and such other information as the division determines.

Newcourt consented to the transfer of the truck tractor but did not release its lien. Consequently, G & G Trucking's application for a new certificate of title after it obtained the vehicle disclosed Newcourt's lien, and that lien was noted on the new title pursuant to this provision. This is all that was required for Newcourt's lien to remain perfected. The debtor's delay in registering the truck tractor in its name and obtaining a new certificate of title had no impact on Newcourt, only on the debtor. Nothing in K.S.A. 1996 Supp. 8-135 required a secured creditor to take additional steps to maintain perfection of its lien once it properly had the lien noted on the title to the vehicle.

For these reasons, the Court concludes the trustee's arguments concerning ratification and perfection of liens on vehicles do not enable her to avoid the liens the debtor granted to Associates, State Bank, or Newcourt. Her claims on these grounds under 11 U.S.C.A. §§544(a), 547(b), and 548(a)(1) all fail. The Court believes there are other issues or claims still pending in this adversary proceeding, and so will not enter a judgment at this time.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of February, 1999.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE